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 NETWORK SOLUTIONS, LLC and
 REGISTER.COM, INC.
 7

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION**

10
 11 PETROLIAM NASIONAL BERHAD
 (“PETRONAS”),

12 Plaintiff,

13 v.

14 GODADDY.COM, INC.,

15 Defendant.
 16
 17
 18
 19

Case No. C09-5939 PJH (JCS)

**MOTION FOR LEAVE TO FILE
 BRIEF *AMICI CURIAE* OF
 NETWORKS SOLUTIONS, LLC
 AND REGISTER.COM, INC. IN
 SUPPORT OF DEFENDANT
 GODADDY.COM’S MOTION
 FOR SUMMARY JUDGMENT**

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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that Networks Solutions, LLC and Register.com,
3 Inc. hereby move this Court for leave to file a brief as *amici curiae* in the above-
4 captioned case in support of Defendant GoDaddy.com's motion for summary
5 judgment. A copy of the proposed brief is appended as an exhibit to this motion.

6 **I. STANDARD FOR MOTION FOR LEAVE TO FILE BRIEF AS *AMICI***
7 ***CURIAE***

8 This Court has broad discretion to permit a non-party to participate in an
9 action as amicus curiae. *See, e.g., Gerritson v. de la Madrid Hurtado*, 819 F.2d
10 1511, 1514 n.3 (9th Cir. 1987); *Nat. Res. Def. Council v. Evans*, 243 F. Supp. 2d
11 1046, 1047 (N.D. Cal. 2003) (holding that amici "may file briefs and may possibly
12 participate in oral argument" in district court actions). As this Court has noted,
13 "[d]istrict courts frequently welcome amicus briefs from non-parties concerning
14 legal issues that have potential ramifications beyond the parties directly involved or
15 if the amic[i] ha[ve] 'unique information or perspective that can help the court
16 beyond the help that the lawyers for the parties are able to provide.'" *Sonoma Falls*
17 *Dev., LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal.
18 2003) (quoting *Cobell v. Norton*, 246 F Supp 2d 59, 62 (D.D.C. 2003) (citation
19 omitted)); *see also In re Nat'l Sec. Agency Tele. Records Litig.*, No. 06-1791 VRW,
20 2009 WL 1561818, at *9-10 (N.D. Cal. June 3, 2009) (relying on submissions of
21 amici curiae regarding proper interpretation of statute).

22 **II. STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE***

23 Network Solutions is a technology company founded in 1979. With more
24 than 6.6 million domain names under management, Network Solutions is one of the
25 five largest domain name registrars in the world. Network Solutions is considered a
26 leading provider of global domain name registration.

27 Register.com was founded in 1994. On April 21, 1999, ICANN announced
28

1 Register.com as one of the first five test-bed registrars for the competitive Shared
2 Registry System. On June 7, 1999, the company began operations as a registrar in
3 the .com, .net, and .org domains. It was the first of the five test-bed registrars to
4 come online. Today, Register.com is one of the ten largest registrars in the world
5 with more than 2.5 million domain names under management.

6 In ruling on GoDaddy.com's motion to dismiss in this matter, the Court
7 indicated a need to develop a record regarding various issues, including what
8 "forwarding" and "routing" are with respect to domain names and how
9 "forwarding" and "routing" "can be considered part of domain name registration
10 services generally." As two of the largest providers of domain name registration
11 services in the world, Network Solutions and Register.com can provide unique
12 information or perspective from the industry perspective that should assist the Court
13 beyond the help that the parties are able to provide. Moreover, the Court's
14 determination regarding whether "forwarding" and "routing" are core registrar
15 functions for purposes of falling within the safe harbor provision of the ACPA will
16 have significant ramifications beyond the parties in this action in that it will effect
17 every domain name registrar who conducts business in the United States.

18 For these reasons, the Court should grant Network Solutions and
19 Register.com leave to file the accompanying *amici curiae* brief and to participate in
20 the proceedings.

21
22 Dated: November 9, 2011

BRYAN CAVE LLP
Aaron M. McKown
Paula L. Zecchini

23
24
25 By: 

26 Aaron M. McKown

27 Attorneys for *Amici Curiae*
REGISTER.COM, INC. and
28 NETWORK SOLUTIONS, LLC

Exhibit A

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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION**

15 PETROLIAM NASIONAL BERHARD
16 (“PETRONAS”),

17 Plaintiff,

18 v.

19 GODADDY.COM, INC.,

20 Defendant.

Case No. C09-5939 PJH (JCS)

**BRIEF OF NETWORKS
SOLUTIONS, LLC AND
REGISTER.COM, INC. AS *AMICI
CURIAE* IN SUPPORT OF
DEFENDANT GODADDY.COM’S
MOTION FOR SUMMARY
JUDGMENT**

1 **I. Statement of Interest**

2 Network Solutions, LLC (“Network Solutions”) is a technology company
3 founded in 1979. With more than 6.6 million domain names under management,
4 Network Solutions is one of the five largest domain name registrars in the world.
5 Network Solutions is considered a leading provider of global domain name
6 registration.

7 Register.com, Inc. (“Register.com”) was founded in 1994. On April 21, 1999,
8 ICANN announced Register.com as one of the first five test-bed registrars for the
9 competitive Shared Registry System. On June 7, 1999, the company began
10 operations as a domain name registrar in the .com, .net, and .org domains. It was the
11 first of the five test-bed registrars to come online. Today, Register.com is one of the
12 ten largest domain name registrars in the world with more than 2.5 million domain
13 names under management.

14 Network Solutions and Register.com understand that this Court is being asked
15 to determine whether the automated provision of domain name “routing” services—
16 essentially, the automated issuance of an electronic order directing Internet traffic to
17 the ultimate destination (such as a Website) selected by a domain name customer—is
18 a core function of domain name registrars and thus, protected activity under the safe
19 harbor provisions of the Anti-Cybersquatting Piracy Act (“ACPA”).

20 Given their positions as ICANN-accredited domain name registrars, Network
21 Solutions and Register.com have an interest in ensuring that the Court is fully
22 apprised of (1) the routing process as it pertains to domain names, (2) the provision
23 of routing services as a core function of the services provided by domain name
24 registrars, and (3) the potentially devastating commercial effect of a ruling that
25 severs routing orders from the registration and maintenance processes.

26 ///

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1 Network Solutions and Register.com are filing this brief pursuant to Local
2 Rule 7-11 and the authority cited in the attached Motion for Leave to File Brief of
3 *Amici Curiae*.

4 **II. Summary of Argument**

5 The safe harbor provision of the ACPA affords protection for those “core
6 functions” of a domain name registrar related to the registration and maintenance of
7 domain names. The routing of domain names to Internet addresses (also called
8 “Internet Protocol” or “IP” addresses) is an inherent part of the domain name
9 registration and maintenance processes. Indeed, the registration process cannot be
10 completed without a domain name registrar’s issuance of an electronic order routing
11 the new domain name to an IP address, nor can such a domain name be functional
12 without a continual routing order. Domain names do not exist in a vacuum on the
13 Internet; to be functional, they must be linked and directed to an IP address, thus
14 facilitating an Internet user’s ability to access the content located at the designated IP
15 address (such as, for example, a Website).

16 The ACPA was enacted to “promote[] the continued ease and efficiency users
17 of the current registration system enjoy by codifying current case law limiting the
18 secondary liability of domain name registrars and registries for the act of registration
19 of a name.” *Panavision Int’l v. Toepfen*, 141 F.3d 1316, 1319 (9th Cir. 1998). A
20 determination that the provision of domain name routing services fall outside a
21 domain name registrar’s core functions would severely limit the willingness of
22 registrars to extend such services to the public. Indeed, such a determination may
23 cause an immediate industry-wide overhaul of the custom and practice with regard to
24 core registration services. When faced with potential liability for the issuance of an
25 automated electronic order that simply serves as a road map to direct Internet traffic
26 to an IP address designated by a domain name customer, many registrars may either
27 cease to offer such services or pass the expense of such liability onto the public.

1 **III. THE ROUTING OF DOMAIN NAMES IS A CORE REGISTRAR**
2 **FUNCTION AFFORDED PROTECTION UNDER THE ACPA**

3 **A. Domain Names and the Internet**

4 The technical details of the Internet have been described in numerous court
5 opinions and will not be repeated in detail here. *See e.g., Reno v. ACLU*, 521 U.S.
6 844, 849-53 (1997). At its most basic, the Internet is a vast network of
7 interconnected computer systems that allows computers on the network to
8 communicate with one another. *See* 47 U.S.C. § 230(f) (defining the Internet as “the
9 international computer network of both Federal and non-Federal interoperable packet
10 switched data networks”).

11 Each computer that is connected to the Internet has a unique Internet Protocol
12 (“IP”) address that functions as an address for that computer on the Internet. *See*
13 *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 576 n.1 (2d Cir. 2000).
14 An IP address consists of four sets of numbers separated by periods. *See id.* at 576.
15 As explained in *National A-1 Adver. v. Network Solutions, Inc.*, 121 F. Supp. 2d 156
16 (D.N.H. 2000):

17 IP addresses function much like Social Security numbers or telephone
18 numbers: each IP address is unique and corresponds to a specific
19 entity connected to the Internet. Because number strings can be
20 cumbersome and difficult to remember, the Domain Name System
21 (“DNS”) was developed to allow users to link a unique (and easier to
22 remember) domain name with a numeric (and more difficult to
23 remember) IP address, thereby making it more convenient for users to
24 access particular addresses on the Internet. So, for example, a user
25 wishing to access the website maintained by International Business
26 Machines need only remember the domain name “IBM.com,” rather
27 than the elaborate numerical IP address of the computer on which
28

1 information relating to IBM's website is maintained (for example, a
2 typical IP address might be something like: 192.168.0.10).

3 *Id.* at 161-162.

4 In order for a computer user to access a specific Internet site, a domain name
5 must be associated with an IP address for that Internet site (such as, for example, a
6 company's corporate Website). Through this association of a domain name with an
7 IP address, Internet traffic is able to be directed—i.e. routed—to a specific IP
8 address. The routing capability is the electronic bridge – or road map – between the
9 user (technically, the user's browser) and the Internet site. Absent an electronic
10 instruction to cross the bridge, a user entering a domain name into his or her browser
11 will never be directed to the associated IP address selected by the domain name
12 customer, and will be unable to access the content contained on the Internet site
13 requested. "This is because domain names serve the sole purpose of making it easier
14 for users to navigate the Internet; the real networking is done through the IP
15 numbers." *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389, 408
16 (S.D.N.Y. 1999).

17 **B. Domain Name Registration Services**

18 Domain names are secured by registering a string of alphanumeric characters
19 with a top-level domain name "registry." Registries are entities that maintain official
20 records correlating domain names with IP addresses for all domain name
21 registrations in a certain top-level domain—i.e., .com, .net, .gov, etc. The actual
22 domain name registration process (i.e., the selection of a domain name and the
23 association of it with an IP address) is performed through the use of a domain name
24 registrar, an organization or commercial entity that is accredited by ICANN and
25 approved by the applicable domain name registry to accept applications for domain
26 names from customers in the public. During the domain name registration process,
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1 the customer selects a domain name character string and an associated IP address to
2 which the domain name is to resolve.

3 Inherent in both the initial domain name registration process and the
4 subsequent maintenance of that domain name registration at the applicable registry,
5 is the automated provision of routing information for the domain name, which serves
6 to direct Internet traffic to a desired end location selected by the domain name
7 customer. This routing information is provided in the form of an electronic order
8 directing Internet traffic to a specific IP address or, in the case of forwarding, to the
9 IP address shared by another domain name. The issuance of this instruction is
10 referred to by domain name registrars as “routing.” “Forwarding” is merely one
11 form of domain name routing, differentiated only by the route the electronic
12 information travels to reach the destination selected by the customer. At their most
13 basic, direct routing and routing by forwarding accomplish the same end result—
14 automated resolution of a domain name to an IP address selected by the customer—
15 only by different means.

16 For a domain name to function on the Internet, routing information or
17 instructions must be submitted during the registration process and then continually
18 maintained while the domain name remains registered. Registration cannot be
19 completed without the issuance of some initial routing instruction. Nor can a
20 functional domain name be maintained absent a continuing association of the domain
21 name with an IP address. All domain names must be associated with an IP address
22 in order to be functional on the Internet—whether that address is specifically
23 assigned to the newly registered domain name or is shared with another domain
24 name.

25 **C. Routing Services Are Afforded Protection Under the ACPA**

26 Domain name registrars are granted immunity under the ACPA for registering
27 and maintaining the registration of domain names:

1 A domain name registrar, a domain name registry, or other domain
2 name registration authority shall not be liable for damages under this
3 section *for the registration or maintenance of a domain name for*
4 *another* absent a showing of bad faith intent to profit from such
5 registration or maintenance of the domain name.

6 15 U.S.C. § 1114(2)(D)(iii) (emphasis added). The federal courts have interpreted
7 the ACPA’s safe harbor provision to include the “core functions” of a registrar. *See*
8 *Solid Host, NL v. Namecheap, Inc.* 652 F. Supp. 2d 1092, 1105 (C.D. Cal. 2009).

9 Network Solutions and Register.com consider the provision of routing
10 information in connection with a domain name to be an essential function of the
11 registration and maintenance processes – without it, a domain name is not functional.
12 In recognition of this fact, Network Solutions and Register.com include both direct
13 routing and routing through forwarding capabilities in the initial domain name
14 registration process, and they permit customers to maintain those services throughout
15 the registration period.

16 **IV. A Judicial Determination That Routing Services Are Not A Core**
17 **Registrar Service Will Potentially Lead To Devastating Effects**

18 A finding by this Court that the provision of routing services (whether directly
19 or through forwarding) goes beyond a registrar’s core functions and thus, is outside
20 the ACPA’s safe harbor provision, would have potentially devastating ramifications
21 for both domain name registrars and consumers. Not only would such a
22 determination stifle the registrar industry by causing a wholesale overhaul of the
23 current registration process, but it would also impose a gatekeeping function on
24 registrars (on an otherwise automated process) previously rejected by other courts.

25 A domain name cannot be registered or maintained without being routed to an
26 IP address. As a result, registration and maintenance services necessarily include,
27 and indeed require, the provision of routing services. With Network Solutions and
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1 Register.com, consumers do not incur a separate routing fee when registering a
2 domain name; rather, the cost is included in the overall fee charged for registration.
3 A determination by this Court that imposes potential liability on domain name
4 registrars for the mere act of issuing an electronic order providing directions for
5 Internet traffic to reach a designated IP address would cause an overhaul of the
6 current domain name registration system to somehow allow for the unbundling of
7 routing services from the registration process. This overhaul would have a chilling
8 effect on commerce and undoubtedly result in an industry-wide increase in the fees
9 associated with registration in order to offset potential liability.

10 Even more problematic is the Hobson's choice presented to domain name
11 registrars when faced with the potential liability for providing routing services:
12 Cease providing registration services altogether or implement an expensive,
13 burdensome, and inaccurate gatekeeping process in hopes of reducing, but not
14 eliminating, potential liability. Given the impossibility of making a subjective
15 determination regarding infringement for every domain name presented for
16 registration (which is commonly accomplished through automated means by the
17 customer visiting the registrars Website), as well as the potential liability from
18 statutory damages of up to \$100,000 per domain name, registrars are likely to opt out
19 of the registration business altogether. Alternatively, registrars are likely to pass on
20 the significant expense associated with such gatekeeping onto the public.

21 This precise outcome was recognized by the Northern District of Texas shortly
22 after the enactment of the ACPA. In *Lockheed Martin*, the court explained that it
23 was Congress' recognition that a registrar could not possibly examine every domain
24 name for infringement that led to the enactment of the ACPA's safe harbor
25 provision:

26 It is quite understandable that Congress did not cause defendant as a
27 domain name registrar, or as a keeper of the registry, to be subject to
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1 civil liability under § 1125(d). . . . Sheer volume alone would prohibit
2 defendant performing the role plaintiff would assign. Defendant
3 simply could not function as a registrar, or as keeper of the registry, if
4 it had to become entangled in, and bear the expense of, disputes
5 regarding the right of a registrant to use a particular domain name.
6 The fact that defendant could theoretically do what plaintiff asks does
7 not mean that defendant is obligated to do so at the risk of financial
8 ruin.

9 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 141 F. Supp. 2d 648, 655 (N.D.
10 Tex. 2001).

11 This is exact the scenario that will occur if the Court holds that routing,
12 whether directly or through forwarding, or the issuance of any other electronic order
13 directing Internet traffic to an IP address associated with a domain name, is not a
14 core registrar function. The practical impact of such a finding would be to impose
15 substantial liability on domain name registrars who have traditionally considered
16 routing a core registrar function. Moreover, in the face of such liability, registrars
17 will be faced with the choice of ceasing routing (and effectively registration) services
18 altogether or passing the substantial expense to implement gatekeeper functions with
19 a continued risk of liability onto the consumer, both of which are contrary to the
20 ACPA's stated purpose "to promote the growth of online commerce." Report 106-
21 140, 106th Cong., 1st Sess. (Aug. 5, 1999) (Legislative History).

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1 **IV. CONCLUSION**

2 Network Solutions, LLC and Register.com, Inc. respectfully request the Court
3 consider its *amici curiae* brief in reaching a determination that the provision of
4 routing services, whether directly or through forwarding, are inherent in the
5 registration and maintenance services provided by domain name registrars and, as
6 such, are protected under the safe harbor provisions of the Anti-Cybersquatting
7 Piracy Act.

8 Dated: November 2, 2011

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By: /s/ Aaron M. McKown

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